

**SANITIZED DECISION -- 06-070 C -- BY GEORGE V. PIPER, ALJ -- SUBMITTED for  
DECISION on JUNE 7, 2006 -- ISSUED on JUNE 19, 2006**

**FINAL DECISION**

**SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- TAXPAYER'S FAILURE TO CARRY BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner. Thereafter, on December 16, 2005, the Director of this Division of the Commissioner’s Office issued a consumers’ sales and services tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2002, through December 31, 2004, for tax of \$, interest, through December 31, 2005, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 20, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W.Va. Code § 11-10A-10 [2002] and W.Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

## **FINDINGS OF FACT**

1. In its petition for reassessment and later at the evidentiary hearing, the Petitioner asserted that it is a very small business and that, in order to compete with the many chains, it must keep its prices low, with a much lower mark-up from cost of goods sold than was used in the audit.

2. Petitioner admits that it was lax in keeping records; however, it believes that its figures and returns are reasonably accurate.

3. At hearing, the Division's tax auditor testified that her review indicated that Petitioner's back-up information was lacking, including the "Z" tapes which show daily sales transactions.

4. The tax auditor then allowed Petitioner a two (2)-month test period in which to establish correct sales figures; however, Petitioner again failed to keep records for seventeen (17) of the sixty (60)-day test period, which required the tax auditor to recalculate said period by using Petitioner's cost of goods sold, times a factor of 3.4, less reported sales, resulting in the present assessment.

5. Petitioner presented no records to support its contention that the tax auditor's figures were incorrect and even admitted that it had not properly collected or remitted consumers' sales and service tax during the audit period.

## **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of proving that the assessment of taxes against it is erroneous, unlawful, void, or otherwise invalid.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2002, through December 31, 2004, for tax of \$, interest of \$, and no additions to tax, for a total assessed liability of \$, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales and service tax assessment until this liability is fully paid.